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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2292/2013*, **

Communication submitted by:	W.K. (represented by counsel, Mylène Barrière, then Stéphanie Valois)
Alleged victim:	The author
State party:	Canada
Date of communication:	23 October 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 24 October 2013 (not issued in document form)
Date of adoption of Views:	27 March 2018
Subject matter:	Expulsion from Canada to Egypt
Procedural issues:	Non-exhaustion of domestic remedies; insufficient substantiation; incompatibility with the Covenant
Substantive issues:	Right to life; risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment
Articles of the Covenant:	6 (1), 7, 9 (1), 17, 18 and 27
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

* Adopted by the Committee at its 122nd session (12 March–6 April 2018).

** The following members of the Committee participated in the consideration of the present communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Ivana Jelić, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santo Pais, Yuval Shany and Margo Waterval.

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1.1 The author of the communication is W.K., a national of Egypt born on 5 January 1975. He claims that his removal to Egypt by Canada would violate his rights under articles 6 (1), 7, 9 (1), 17, 18 and 27 of the Covenant because he fears that he will be killed or tortured on grounds of his sexual orientation and his conversion from Islam to Christianity. He is represented by counsel.

1.2 On 24 October 2013, in accordance with rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to expel the author to Egypt while the communication was being considered. On 23 March 2017, the State party requested that the interim measures with regard to the author be lifted on the grounds that he had failed to substantiate his claims, that he had not exhausted domestic remedies and that his communication contained allegations that were incompatible *ratione materiae* with the provisions of the Covenant. The Committee rejected the request on 17 July 2017. The State party has postponed the removal of the author, who currently resides in Canada.

The facts as submitted by the author

2.1 The author is an Egyptian national and a lawyer by training. He identifies as homosexual. On the night of 24 to 25 December 2012, he was assaulted by members of the Muslim Brotherhood at his home in Egypt, which he shared with his partner Hany. His partner was reportedly murdered and the author was seriously injured after being hit on the head and scalded on various parts of his body.[1] After the assault, the author took shelter at the house of a Russian friend, Inna, whom he had met in May 2012.

2.2 In February 2013, with Inna's help, the author fled Egypt for the Russian Federation, where he applied for asylum in March 2013, though he omitted to mention his sexual orientation out of fear of a negative reaction on the part of the Russian authorities. Having developed his Christian faith in Egypt, the author converted to Christianity on 9 June 2013 and practised that religion consistently and fervently during his stay in the Russian Federation. He married Inna, but maintains that it was merely a marriage of convenience entered into with the sole purpose of regularizing his status in the Russian Federation. Nevertheless, his asylum application was rejected by the Russian authorities, which did not believe his claims and ordered him to leave the country by 25 August 2013. Fearful of returning to Egypt, where he claimed to have received death threats from his family on account of his conversion, the author obtained a fake passport in order to travel to Canada.

2.3 On 11 September 2013, the author arrived in Canada on a fake Israeli passport. He requested entry into Canada for two weeks in order to see a friend, Inna,[2] and to visit art galleries. He had a return ticket to Tel Aviv. The border official asked if he wished to seek asylum in Canada and whether he feared for his life anywhere in the world, including in Israel. The author replied that he did not, fearing that he would be expelled if his passport was discovered to be fake. After failing to reach the author's friend via telephone, the official noticed irregularities in the passport and questioned him in this regard. The author admitted to having purchased the passport and explained that he did not want to leave Canada because he had serious problems in Egypt related to his homosexuality, that he had

[1] Photographs allegedly taken at the time of the events are annexed to the file. The author also provided a letter, dated 20 October 2013, from a nurse who went to the Laval immigration holding centre at the request of the author's lawyer in order to examine him and record the characteristics of any marks, scars and other injuries found on his body and head. The nurse spoke with the author for 20 minutes in the visitation room. On her arrival, the authorities informed the nurse that she could meet with the author but could not examine him, i.e. that she could not touch him and that the author could not remove his top or roll up his sleeves, and that they would not be able to meet in a private room. Under those circumstances, the nurse admitted that her observations were cursory. The author pointed to a linear section, approximately 8 cm long, running from the occipital area to the parietal lobe. The nurse noted "a difference in the appearance of the scalp in this area (typical of an area that has been injured, scar tissue), but [her] observations were limited because [she] was unable to touch the area or use sufficient light". The nurse concluded by saying that "a more in-depth examination would have made it possible to more precisely assess the length, exact location and characteristics of the scar, for example the presence of suture marks".

[2] His wife whom he married in the Russian Federation.

been assaulted and that his partner had been killed. The official reported the situation to the representative of Immigration, Refugees and Citizenship Canada (IRCC) and recommended that an exclusion order be issued for attempted entry into Canada using fraudulent documents.

2.4 As a result, the IRCC representative determined that the author was inadmissible and, that same day, issued an exclusion order against him.[3] The author was thus unable to file an asylum application with the Immigration and Refugee Board of Canada (IRB) because of the exclusion order.[4] He was then detained for holding a fraudulent passport and because his identity could not be established.[5] His removal was scheduled for the next day, but the Canada Border Services Agency (CBSA) had to cancel it because of the author's health, as he had slit his left wrist before heading to the airport.[6] The author received medical attention at the holding centre and was informed that his removal would take place the following day. He was given a form to apply for a pre-removal risk assessment (PRRA).

2.5 On 13 September 2013, the author requested the Federal Court to temporarily suspend the exclusion order. The request became moot that same day when the author was informed that his removal would not take place before 17 September 2013, after he had met with a removal agent on 16 September. Several dates for the removal were set and later cancelled. The author filed a PRRA application on 16 September 2013.

2.6 On 17 September 2013, the author filed for an administrative suspension with a view to having the enforcement of the exclusion order postponed until the PRRA application could be considered. On 18 September 2013, his suspension request was denied. On 23 December 2013, the Federal Court dismissed his application for leave to seek judicial review of the enforcement agent's decision.

2.7 On 17 October 2013, following a hearing on 1 October 2013,[7] the author's PRRA application was rejected owing to the contradictions observed by the PRRA agent. The agent considered that the author had not provided credible evidence to substantiate his alleged homosexual relationship, the assault by the Muslim Brotherhood at his home or the risk emanating from his family on account of his conversion to Christianity. His subsequent attempts to explain the contradictions and irregularities in his account were also found to be inconsistent and implausible. In the agent's opinion, there was only a mere possibility that the author's fears would materialize, so she concluded that the author ran no personal risk of suffering irreparable harm were he to be removed to Egypt.

2.8 On 21 October 2013, the author applied for leave to seek judicial review in respect of the rejection of his PRRA application. That same day, he requested a suspension of his removal until a decision was taken on his application for leave to seek judicial review. CBSA agreed to postpone his removal so that he could obtain a response regarding his PRRA application.

2.9 On 4 April 2014, the Federal Court admitted the application for leave to seek judicial review in relation to the rejection of the author's PRRA application, setting the hearing on the merits for 2 July 2014. On 7 July 2014, the Federal Court upheld the appeal and transmitted the file to another agent for reconsideration, having found that the PRRA agent had not come to an explicit conclusion regarding the author's sexual orientation despite the issue being central to his application. The agent had limited her analysis to the relationship the author claimed to have had with Hany and to the assault against both men

[3] On 24 January 2014, the Federal Court dismissed the application for leave to seek judicial review regarding the decision of 11 September 2013.

[4] The author maintains that he was not informed of the fact that he could file an application for protection with the Canadian authorities and that no pre-removal risk assessment application form was provided to him.

[5] On 13, 19 and 26 September 2013, the reasons for the author's detention were reviewed but the detention was upheld owing to the fraudulent passport and the risk of flight. He was released on bail on 13 November 2013.

[6] The author claims that he was desperate and had no other hope of avoiding expulsion, so he tried to commit suicide by cutting the veins in his left wrist.

[7] In addition to questioning the author, the agent telephoned Inna to question her about the file and affidavit she had provided.

on the night of 24–25 December 2012. In the Federal Court's view, disbelieving the relationship between the author and Hany and the fact that they had been assaulted and disbelieving claims about the author's sexual orientation were two completely separate issues. A precise conclusion was necessary, especially since the agent who had omitted to make a determination regarding the author's sexual orientation had also recognized that there was documentary evidence that homosexuals were at risk in Egypt and were subjected to a degree of violence and discrimination.

2.10 On 21 August 2014, a new PRRA agent began the reconsideration of the author's application. On 5 and 22 September and 29 October 2014, the author submitted additional information and documents, including a letter from his general practitioner, noting a diagnosis of post-traumatic stress and a depressive state, as well as scars left by the assault;[8] a psychological report;[9] and letters from five pastors. In addition, the author notes that his apostasy had been publicized on the Internet by Inna[10] and shared with his sister, who had forwarded the post to the author's friends and acquaintances. He also noted that, since the Egyptian authorities monitored the Internet, it was possible that they were aware of the information. On 21 January 2015, an all-day hearing was held with the PRRA agent. On 22, 23, 26 and 30 January 2015 and 20 February 2015, the author made written submissions describing his fears of being persecuted on account of his conversion to Christianity, his sexual orientation and political opinions that had been ascribed to him. He also submitted documents describing the human rights situation in Egypt and claimed that he faced additional risk because his sister, a famous actress, and her husband, an influential judge in Egypt, had reported him to friends, family members and the authorities.

2.11 On 26 February 2015, the author's PRRA application was rejected owing to a lack of credibility. The agent considered that the author had a great ability to easily adapt his statement but that the myriad contradictions and improbabilities proved that his story had been fabricated to obtain protection in Canada. In the agent's view, the author had not demonstrated that there was anything more than a mere possibility of persecution, as defined in article 96 of the Immigration and Refugee Protection Act, and he had failed to establish that he would run a risk of death, torture or other harm enumerated in article 97 of the Act. Regarding the author's conversion, the agent found that, notwithstanding his knowledge of Christianity, his baptism and his church attendance, the author was not a "genuine Christian"[11] and that he had gained knowledge of Christianity in order to embellish his claim for protection. The agent also found that the author had failed to prove beyond a mere possibility that he would be perceived as having converted to Christianity were he to return to Egypt.[12] As to the author's homosexuality, the agent had considered the author's three homosexual relationships in Egypt and had concluded that he was not gay owing to a lack of evidence that he had entered into homosexual relationships prior to his arrival in Canada or that he would adopt a homosexual lifestyle or engage in homosexual activity if he returned to Egypt. Since there was little more than a "possibility of

[8] Letter of 16 October 2014 from a doctor at the clinic for asylum seekers and refugees in Montreal, in which the doctor mentions that the author has "scarring on his back, shoulders and scalp due to the attack described above".

[9] The psychological assessment report of 3 September 2014 states that the author "still shows signs of post-traumatic stress, combined with a depressive state and difficulty focusing and memorizing, but mostly an all-encompassing anxiety at the thought of returning to his country of origin since his homosexuality and conversion to Christianity have been revealed".

[10] The author also noted that Inna had recently assaulted him and had been formally charged. In his opinion, Inna is unstable and resents him for refusing to have an intimate relationship with her. Therefore, he requested that she not be contacted as a witness because her intention was to harm his case to force him to leave Canada.

[11] The decision in original English mentions that the author "is not a genuine Christian adherent and that he obtained his knowledge of Christianity in order to embellish a claim for protection".

[12] The agent mentioned, inter alia, that even though the author had provided a copy of his baptism certificate, he had been unable at the hearing to state the exact date of his baptism, the Christian denomination to which he subscribed or the sacraments. Moreover, when the author had provided information on Islam, he had used the pronoun "we" whereas he used the term "Christians" when referring to Christianity, which called into question his allegiance to that religion.

persecution", the agent was not convinced that the author would be victimized by his family or the authorities on account of his purported sexual orientation or religious conversion.

2.12 On 25 August 2015, the Federal Court dismissed the author's application for leave to seek judicial review of his failed PRRA application as it considered that the documents provided by the author, including written, oral and visual evidence, had revealed major contradictions in his case and that the inconsistencies clearly showed a lack of credibility. The Federal Court upheld the point-by-point analysis by the PRRA agent, noting that he had been detailed in his description of the reasons for not having found the author credible with regard to the obtainment of his passport, his sexual orientation and his religious conversion. According to the Federal Court, the agent also demonstrated how the author's sexuality was entirely called into question by his relationships with women.

The complaint

3.1 The author contends that his expulsion would constitute a violation of articles 6 (1), 7, 9 (1), 17, 18 and 27 of the Covenant because his liberty, security and life would be threatened and he would run a risk of torture and cruel, inhuman or degrading treatment or punishment on account of his sexual orientation and conversion from Islam to Christianity. His religious freedom would also be violated. He recalls that he has already received death threats from his sister and her husband, who are important figures in Egypt.

3.2 The author further claims that Canada has not reasonably assessed the risk inherent in his removal.

State party's observations on admissibility

4.1 On 23 May 2014, the State party submitted its observations on admissibility, requesting that the admissibility and merits of the communication be considered separately. The State party considers that the author's allegations are inadmissible for two main reasons: non-exhaustion of domestic remedies and incompatibility of some of the allegations with the provisions of the Covenant.

4.2 Regarding non-exhaustion of domestic remedies, the State party notes that, at the time of writing its observations, the Federal Court had received, on 4 April 2014, the application for leave to seek judicial review of the PRRA decision, but that the appeal had yet to be heard on the merits. Approval of the PRRA application would confer on the author either asylum or the status of a person in need of protection, which is the redress sought by the author through his communication to the Committee. Furthermore, the PRRA system has been found by the Committee to be an effective remedy that should be exhausted for the purposes of admissibility.

4.3 The State party points out that, when the author arrived in Canada on a fraudulent passport, he was asked questions before the exclusion order was issued. Two law enforcement agents asked him clear and precise questions on two occasions with the aim of determining whether he required protection, but he maintained that he had no fears in any country.[13] His reply meant that he did not qualify for refugee status. However, when he was notified that an exclusion order had been issued against him and that he could no longer seek asylum,[14] he changed his story and indicated that he feared irreparable harm if he were removed to Egypt because he was gay and had recently converted to Christianity. Consequently, the author was entitled to a pre-removal risk assessment (PRRA), which allowed him to contest his removal, including as part of a hearing before the competent

[13] The State party indicates that the border official asked the author the following three questions: (1) whether he came to Canada to seek asylum; (2) whether he came to Canada because he feared for his life in any country in the world; and (3) whether he had any problems in Israel. The author replied in the negative to all of these questions. Then, before concluding that the author was inadmissible and issuing an expulsion order, the IRCC representative asked the author the following three questions: (1) Is your life in danger in Israel or any part of the world?; (2) Do you fear for your life in Israel or any part of the world?; and (3) Will you be in danger if you returned to Israel or any country of the world? The author replied in the negative to all of these questions.

[14] Under article 99 (3) of the Immigration and Refugee Protection Act, an asylum claim cannot be made by a person who is subject to a removal order.

impartial authorities. However, following an in-depth hearing and the consideration of written statements submitted by the parties, the Canadian authorities concluded that the author's claim that he would suffer irreparable harm if removed was not credible.

4.4 In order to give the author the opportunity to explain the irregularities in his statement, IRCC held an oral PRRA hearing on 1 October 2013.[15] The author was asked clearly worded questions designed to clarify contradictions in his statements on several occasions. Yet, not only was his original story judged not to be credible, his later explanations to correct the contradictions were found to be inconsistent and implausible as well. In addition, the author did not provide any objective evidence of the assault of which he claimed to have been a victim or of the alleged death of his partner, whose last name he did not reveal,[16] nor did he produce a medical report describing the injuries he claimed to have sustained. Moreover, he did not provide any supporting documents, such as a death certificate or media report of the assault, to corroborate the claim concerning his partner's death, or a photograph of his partner, either alone or together with the author.

4.5 In addition, the State party considers that the author's allegations are incompatible *ratione materiae* with the Covenant insofar as States parties do not have the obligation to refrain from returning a person even if there is a risk that the person's rights under articles 9 (1), 17, 18 and 27 of the Covenant will be violated because these articles do not apply outside the territory of a State party. Canada can, therefore, expel foreign nationals to countries where these articles might be infringed. The State party points out that it is only on an exceptional basis that the Committee has ascribed extraterritorial scope to rights enshrined in the Covenant, thereby respecting the instrument's largely territorial application. Removing the author to Egypt does not amount to any failure whatsoever to observe the country's obligations under articles 9 (1), 17, 18 and 27 of the Covenant.[17] This practice is in line with the territorial application of the Convention for the Protection of Human Rights and Fundamental Freedoms as defined by the European Court of Human Rights.[18] The States parties to the Covenant do not have an obligation to ensure, prior to returning foreign nationals to their country of origin, that the conditions in the receiving country completely and effectively satisfy each and every substantive guarantee in the Covenant or that these rights are respected there, except where the conditions violate the guarantees set out in articles 6 and 7 of the Covenant. Limiting a State's power to control immigration at its borders by giving all the articles of the Covenant extraterritorial scope would amount to denying State sovereignty. Consequently, the claims that these articles would be violated are incompatible *ratione materiae* with the Covenant, in accordance with article 3 of the Optional Protocol to the Covenant and rule 96 (d) of the Committee's rules of procedure. In the alternative, the State party considers that the claim regarding article 17 is inadmissible on grounds of the non-exhaustion of domestic remedies because it was never raised before the Canadian authorities.

4.6 The State party further considers that the author has not exhausted available domestic remedies, thereby rendering his communication inadmissible. On 4 April 2014, the Federal Court granted the application for leave to seek judicial review in relation to the PRRA decision, which is a remedy that could provide the author with the desired redress.

Author's comments on the State party's observations

5.1 On 8 January 2016, the author submitted his comments on the State party's observations in which he repeats his claims under articles 6, 7, 9, 17, 18 and 27 of the Covenant.

5.2 The author points out that not having requested asylum immediately upon arrival in Canada had meant that he could not submit an application to IRB. As a result of the

[15] The State party specifies that hearings are not usually held in relation to PRRA applications unless the applicant's credibility is in doubt.

[16] The PRRA decision of 26 February 2015 does, however, mention the name Hany Soleiman or Souleiman.

[17] The State party refers to paras. 3, 10 and 12 of the Committee's general comment No. 31 (2004) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant.

[18] See *Soering v. United Kingdom*, No. 14038/88, 7 July 1989, para. 86.

measure taken against him by the border official at the airport, he became subject to an exclusion order that could be enforced immediately given that the PRRA procedure does not have a suspensive effect on removals in such cases. According to the author, the procedure violates the principle of non-refoulement. The author also points out that he was never informed of his right to apply for asylum or protection and that, once the exclusion order had been issued, Canadian agents did not inform him of his right to file a PRRA application.

5.3 The author also challenges the PRRA procedure, given that the person being heard does not enjoy the same procedural guarantees as in a judicial or quasi-judicial procedure. He therefore claims to have been adversely affected by a number of breaches of procedural fairness rules by the PRRA agent. For example, the PRRA hearing was not recorded. Furthermore, the PRRA agent had all the notes of the officials who had questioned the author at his point of entry into Canada but he had not been given the same access. The agent also entered a complaint letter into evidence without sharing its content with him.[19] Referring to studies illustrating how difficult it is for asylum seekers to establish the facts motivating their application[20] and guidelines on procedures to be put in place in respect of vulnerable persons,[21] the author challenges the fact that the PRRA proceeding focused on his credibility by confronting him with interview notes taken when he was facing a risk of removal and was in a very fragile psychological state.[22] In this context, the authorities should have relied on the documentary evidence in the file rather than focus on the credibility of his statement. The border official ignored the evidence regarding the author's religious practice as submitted by credible and reliable witnesses.

5.4 Regarding his conversion, the author refers to the evidence that was submitted along with his file and was not challenged during the PRRA.[23] The author also refers to documentary evidence annexed to the file that there had been a rise in extremism and the persecution of Christians in Egypt and that converts to Christianity were sentenced to death. He considers that these documents and evidence demonstrate that his fear of persecution in Egypt is well-founded. He adds that the Egyptian identity card contains information on the holder's religion. Despite these submissions and evidence, the PRRA agent rejected the author's request for protection without providing any reasonable arguments. The author considers that the State party should have determined whether he had a well-founded fear of being persecuted if returned to his country and that this was not done, including by the Federal Court, thereby putting his life at risk. While he admits making mistakes in his statement, the author stresses that some facts were not challenged. For instance, it had been demonstrated that his conversion and Christian faith were known by a number of people in Egypt and that a simple online search of his name yields information in this regard. It had also been demonstrated that Egypt monitored Internet posts very closely. According to the author, these facts are enough to substantiate the risk to his life and safety if he were to return to Egypt.

5.5 Lastly, the author refers to the Committee's general comment No. 20 (1992), which states that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of

[19] The author does not specify to what complaint letter he is referring but notes that its use completely destabilized him since the agent clearly attached greater importance to the letter than to his statement.

[20] Without, however, providing specifics about the studies he cites.

[21] Which are reportedly available on the website of IRB but are apparently not followed by PRRA agents.

[22] The author claims that his psychological state, which was proven in the psychological assessment report of 3 September 2014, was not refuted by the PRRA agent. However, the agent did not take into account the findings of the report, which argued that the author might have difficulty making a statement in a stressful situation ("He might forget important details if he feels threatened or under pressure, his story could become confused and a degree of emotional or cognitive disorganization might ensue.")

[23] The author states that he attended a number of churches in Canada, as attested to in his affidavit of 5 September 2014 and in letters from various pastors annexed to the file; that his conversion is clearly reflected in his paintings and the fact that he wears a cross around his neck; and that Pastor I.F. confirmed in a letter dated 4 January 2016, which was included in the file, that his conversion was genuine.

their extradition, expulsion or refoulement."[24] He recalls that the Committee has confirmed that, when there is a foreseeable risk of corporal punishment, expulsion violates article 7 of the Covenant if the risk is real, in other words if it is a necessary and predictable consequence of expulsion.[25] The author also refers to *Judge v. Canada*,[26] in which the Committee considered that the author's extradition from Canada to the United States of America violated articles 6 and 7 of the Covenant. In conclusion, the author contends that the State party violated his rights under articles 6, 7, 9, 17, 18 and 27 of the Covenant by not assessing his fear in accordance with international rules in order to ensure that his rights under the Covenant would be respected if he were returned to his country.

Additional observations by the State party on admissibility and merits

6.1 On 23 March 2017, the State party submitted its additional observations on the admissibility and merits. The State party reiterates its previous observations and maintains that the communication is inadmissible under articles 2 and 5 of the Optional Protocol since the author has failed to exhaust the available domestic remedies, and under article 3 of the Optional Protocol and rule 96 (d) of the rules of procedure since the alleged violations of articles 9 (1), 17, 18 and 27 are incompatible *ratione materiae* with the Covenant. In the alternative, since the author never alleged a violation of article 17 of the Covenant before the Canadian courts, this claim should be declared inadmissible on grounds of non-exhaustion of domestic remedies. The communication should also be dismissed on the merits, as the author has failed to demonstrate that Canada has in any way neglected its obligations under the Covenant.

6.2 With regard to non-exhaustion of domestic remedies, the State party indicates that the author has not filed an application for permanent residence on humanitarian and compassionate grounds ("H&C application"). This remedy is an exceptional measure derogating from the rules established by law for obtaining permanent residence and permits the granting of permanent residence on humanitarian grounds. An individual whose H&C application is rejected may contest this decision before the Federal Court. Furthermore, a request for a judicial stay of removal may be filed with the Federal Court pending a request for leave to seek judicial review of an unfavourable H&C decision. The State party recalls the Committee's jurisprudence according to which an H&C application is a remedy that must be exhausted before the Committee can consider a communication admissible.[27] It emphasizes that, in *Dastgir v. Canada* and *Khan v. Canada*, the Committee observed that the possibility of submitting an H&C application was among the domestic remedies available for access to an effective remedy,[28] and therefore declared the two communications inadmissible on grounds of non-exhaustion of domestic remedies.

6.3 However, the State party expresses its concern that in *Warsame v. Canada* and *K.A.L. and A.A.M.L. v. Canada*, the H&C application was not considered a remedy that must be exhausted for the purposes of admissibility.[29] The State party disagrees with this jurisprudence and argues that, taking into account the specific circumstances of the case, the author had a right under the Immigration and Refugee Protection Act to submit an H&C application. Moreover, under article 25 (1) of the Immigration and Refugee Protection Act, when an individual submits an H&C application, the Minister "must" examine the case. IRCC therefore has an obligation to examine each H&C application filed. The H&C application is thus a fair and equitable administrative procedure, subject to judicial review, which, in the event of a favourable decision, would allow the author to remain in Canada. The State party submits that, for the purposes of admissibility, the H&C application is an effective domestic remedy that must be exhausted by any individual who has been denied

[24] General comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, para. 9.

[25] The author refers to the cases *G.T. v. Australia* (CCPR/C/61/D/706/1996) and *A.R.J. v. Australia* (CCPR/C/60/D/692/1996).

[26] See *Judge v. Canada* (CCPR/C/78/D/829/1998).

[27] See *Khan v. Canada* (CCPR/C/87/D/1302/2004), para. 5.5.

[28] See *Dastgir v. Canada* (CCPR/C/94/D/1578/2007), para. 6.2, and *Khan v. Canada*, para. 5.5.

[29] See *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 7.4, and *K.A.L. and A.A.M.L. v. Canada* (CCPR/C/104/D/1816/2008), para. 6.5.

status as a refugee or person in need of protection. The burden of proof rests on the author to demonstrate that he has exhausted all available domestic remedies or that any remedies he has not exhausted would prolong his case excessively or would be unlikely to bring effective relief.

6.4 The State party recalls that the author's allegations that Canada has violated articles 9 (1), 17, 18 and 27 of the Covenant are incompatible with the provisions of the Covenant, which do not have extraterritorial application.

6.5 It further submits that the author has failed to substantiate his allegations of discrimination under articles 6 (1), 7 and 9 (1) of the Covenant. Moreover, the author does not specify how articles 17, 18 and 27 have been violated in his case and does not provide any evidence to substantiate his claims under articles 9 (1), 17, 18 and 27 of the Covenant. The State party therefore considers that the communication is manifestly unfounded and should be rejected on the merits.

6.6 The State party recalls that the Canadian decision-making bodies that examined the author's case file all concluded that his claims about his sexual orientation and his conversion to Christianity — and the alleged risks of irreparable harm that would ensue if he were returned to Egypt — were neither credible nor sufficiently substantiated. It also recalls that the author has enjoyed the right to two pre-removal risk assessments challenging his removal, including two in-depth oral hearings, each before impartial and competent authorities and with the assistance of a lawyer. The author has also on two occasions contested the unfavourable PRRA decisions before the Federal Court. His testimony, the many written representations and all other evidence were taken into account in the context of the second PRRA review. The State party considers that this is clearly demonstrated in the PRRA agent's comprehensive and detailed reasoning, which extends to 20 pages and was upheld by the Federal Court, which concluded that the agent's decision had been based on a thorough analysis and was reasonable and fully supported by the evidence on the record. Represented by legal counsel at all stages, the author has had many opportunities to substantiate his allegations and to submit evidence in accordance with the law and the rules of procedural fairness. Moreover, the author's communication and observations before the Committee contain the same claims and documents as he submitted to the Canadian decision-making bodies.

6.7 With regard to the author's claim that his failure to request asylum immediately at the point of entry to Canada led to him being unable to submit an application for asylum before IRB, the State party submits that the decision to issue him with an exclusion order was taken upon his arrival because he had attempted to enter Canada using fraudulent documents, in contravention of the Immigration and Refugee Protection Act and its regulations. Under article 99 (3) of the Act, persons subject to an exclusion order cannot subsequently submit an application for asylum to IRB. The State party submits that the author was informed of his right to seek protection in Canada on the date of his arrival. In this regard, the State party refers to its initial observations, where it explained that, before the exclusion order was issued, the author had been asked clear and precise questions.[30] It was only once he was denied entry to Canada that the author told the border official that he was fearful of returning to Egypt and wished to apply for asylum. He was then informed that he could request a pre-removal risk assessment. He received a PRRA application form the same day and a second one the following day as the first one was no longer in his possession.

6.8 The State party also contests the author's claim that it attempted to remove him the day after his arrival without giving him the opportunity to submit his PRRA application. Recalling that the author arrived with a fraudulent passport, the State party indicates that he had the option to request the border official to issue an administrative stay of removal or to request the Federal Court to issue a judicial stay of the enforcement of the exclusion order. On 13 September 2013, the author submitted an application to the Federal Court for a temporary stay of the exclusion order. The application became academic the same day, as the author was notified by the CBSA that his removal would not take place before 17

[30] See para. 4.3 above.

September. The author submitted his PRRA application on 16 September 2013 and CBSA agreed to defer his removal to allow him to await a response to it, despite the fact that under the Immigration and Refugee Protection Act such an application does not have a suspensive effect on an exclusion order.

6.9 With regard to procedural fairness in the review of the PRRA application, the State party explains that an oral hearing is informal and non-adversarial. Such a hearing, the purpose of which is to assess the applicant's credibility, can be held if the PRRA agent finds that the evidence provided suggests that the claimant is not credible, as was the case here. The hearing gives the PRRA applicant the opportunity to answer the questions posed, assisted by legal counsel if necessary.

6.10 The State party maintains that, when assessing the author's credibility, the PRRA agent took into account his vulnerability as an asylum seeker and his psychological state. Upon conducting the judicial review of the agent's decision, the Federal Court found that the agent's assessment of the author's credibility was reasonable and that the agent had clearly explained why he had not found the applicant to be credible based on the documentary evidence provided.

6.11 Lastly, contrary to the claims of the author, the State party considers that the PRRA agent did not focus solely on the author's credibility when arriving at his decision. Upon its judicial review of the PRRA decision, the Federal Court found that the decision was entirely reasonable and noted that it had been based on an analysis of all the documentation provided, which supported the agent's findings.

6.12 The State party therefore submits that the author has not established that the assessment conducted by the Canadian decision-making bodies was manifestly arbitrary or amounted to a denial of justice. It recalls that it is not the Committee's function to act as a fourth jurisdiction to review the decisions taken by the competent Canadian authorities,[31] particularly in respect of determining the existence of substantial grounds for believing that there is a real risk of irreparable harm upon expulsion. [32] Neither the author's communication nor his observations establish that the decisions of the Canadian authorities were in any way flawed.

6.13 The State party also considers that the author's allegations concerning the homosexual relationships he maintained in Egypt, including with an individual named Hany, are highly doubtful and are not supported by objective evidence. In particular, the author has not submitted any objective evidence of the alleged attack or the death of his partner, nor has he provided his partner's photograph or death certificate. Neither has the author provided any media reports of the attack, nor had any of his friends or family members met Hany.

6.14 Furthermore, the oral hearing in 2013 revealed contradictions in relation to the head injuries the author claims to have sustained, and the photographic evidence provided does not show where the author was allegedly injured. The medical letter submitted by the author at the time of the second review of his PRRA application[33] — and which he had not submitted in support of his initial communication — documents the injuries that he allegedly sustained and his scars. However, the letter does not explain the doctor's reasons for stating that the scars on the author's back, shoulders and head resulted from the 2012 attack and is based entirely on the author's account.

6.15 The State party also indicates that the alleged attack was not carried out by, or with the complicity of, State authorities. The fact that the author renewed his Egyptian passport two months before the alleged attack undermines any allegations of persecution of him by the Egyptian authorities. As to the author's claims that his sister is a well-known actor and

[31] See *Hamida v. Canada* (CCPR/C/98/D/1544/2007), paras. 8.4–8.6; *Solo Tarlue v. Canada* (CCPR/C/95/D/1551/2007), para. 7.4; *Kaur v. Canada* (CCPR/C/94/D/1455/2006), para. 7.3; and *Tadman and Prentice v. Canada* (CCPR/C/93/D/1481/2006), para. 7.3.

[32] See *Choudhary v. Canada* (CCPR/C/109/D/1898/2009), para. 9.2; *Thuraisamy v. Canada* (CCPR/C/106/D/1912/2009), para. 7.4; *A.A. v. Canada* (CCPR/C/103/D/1819/2008), para. 7.8; and *Pillai et al. v. Canada* (CCPR/C/101/D/1763/2008), paras. 11.2 and 11.4.

[33] See footnote 8 above.

that his brother-in-law is an influential judge in Egypt, the evidence provided by the author (namely photographs from YouTube and Facebook and newspaper articles) does not establish that these individuals are indeed his sister and brother-in-law nor that they had reported him to the State authorities as being a homosexual. Moreover, the simple fact of having been reported by his own family — which the author has not established — does not prove that the author is a target of the Egyptian authorities such that there are substantial grounds for believing that he would suffer irreparable harm if returned to Egypt. Moreover, the fact that Egyptian identity cards contain information on the religion of the holder is not sufficient to infer that as a result the author would be targeted by the Egyptian authorities, let alone that he would be at risk of death, torture or cruel, inhuman or degrading treatment if he were arrested or detained by them.

6.16 With regard to the author's conversion, the State party claims that doubt is cast on it by his inability to provide key details concerning his faith and religion. For example, at the oral hearing in 2015, the author was unable to cite the exact date of his baptism. Moreover, at the same hearing, the author was unable to indicate which Christian denomination he belonged to or to list the Christian sacraments, despite claiming to have spent many hours studying Christianity and to have attended church for more than a year. In addition, the State party submits that while the letters from a number of church pastors in Canada are evidence of the author's participation in the activities of these churches, they provide few relevant elements to support the author's conversion and faith. For example, the letters provide no proof of the motivation for the author's conversion to Christianity, nor do they show that his conversion is common knowledge either beyond the communities of their churches or in Egypt or prove that the author would maintain his Christian faith if he were removed to Egypt.

6.17 Finally, regarding the human rights situation in Egypt, the State party recalls that the Committee has made it clear that the existence of widespread violence in a country is not sufficient to demonstrate a violation of the Covenant. The merits of the allegations of risk in light of the human rights situation in a country depends on the particular circumstances of the author. In this regard, the State party maintains that the author's allegations are merely statements and assumptions. It is not enough for the author to rely on general information about the incidence of crimes committed against apostates and homosexuals in Egypt as proof that he would be at risk of irreparable harm. Sufficient evidence should be provided to substantiate a personal risk as an inevitable and foreseeable consequence of his removal. Even if the sources cited by the author provide an accurate reflection of the situation in Egypt, they do not establish any causal link to the author's particular circumstances and therefore have no bearing on this case.

Author's comments on the State party's additional observations

7.1 On 6 July 2017, the author submitted his comments on the State party's additional observations. He recalls that he had entered Canada to seek protection, that he was in possession of a fraudulent passport and that he had been issued with an exclusion order for that reason. When asked whether he was fearful of returning to his country, he had replied that he was not in an attempt to show that the passport he was using corresponded to his true identity. The author submits that the Convention relating to the Status of Refugees recognizes that refugees often have no other alternative but to enter a country of asylum in an unlawful or irregular manner. Penalties therefore cannot be imposed on refugees who do so.[34] The author submits that Canadian law has incorporated this provision in its domestic legislation, since a refugee cannot be charged with the offence of using false documents.[35]

7.2 Furthermore, the author claims that his conversion was not properly assessed by the PRRA agent, who rejected without cause the various documents submitted in support of his allegations. The fact of his baptism was never challenged and the letters from the church

[34] The author cites article 31 of the Convention relating to the Status of Refugees.

[35] The author refers to article 133 of the Immigration and Refugee Protection Act.

pastors were not questioned.[36] In addition, the author uses a different name — Marco David — as it better reflects his Christian identity.

7.3 The author also claims that the immigration guidelines indicate that a subsequent PRRA is limited in its analysis of the evidence. Where an applicant has previously applied for a PRRA, the new application is assessed solely on the basis of risks that arose after the first PRRA was conducted, unless the agent believes that it would be in the interests of justice to reassess an issue that has already been addressed in the first PRRA. The jurisdiction of the Federal Court is limited to issues of jurisdiction, the principle of natural justice, procedural fairness or legal errors, or instances in which an agent has issued a decision that is based on an erroneous finding of fact or was made in a perverse or capricious manner or without regard for the material presented. In addition to these jurisdictional limitations, the jurisprudence of the Federal Court indicates that it should intervene only in very limited circumstances. Indeed, the Supreme Court of Canada has issued a test of the reasonableness of decisions which is based on their "justification, transparency and intelligibility". The Federal Court must therefore determine whether the decision and its justification are reasonable. In the case of the author, the Federal Court decision is very short and does not address the author's arguments to the effect that the agent did not assess his religious conversion, the documents provided in support thereof and in particular the risk ensuing from his conversion should he be removed to Egypt. The author therefore considers that, owing to its limitations, the remedy of judicial review does not protect applicants from the arbitrariness of the PRRA procedure.

7.4 With regard to the H&C application, the author submits that making such an application does not result in a stay of removal, as has been recognized by the Committee.[37] Furthermore, the H&C application is not intended to take the place of a claim for protection, as has been reiterated by the Supreme Court of Canada.[38] The author also refers to the instructions on the limitation on assessment of risk in an in-Canada application — available on the official website of the Government of Canada — according to which agents do not determine whether a well-founded fear of persecution, risk to life, danger of torture and risk of cruel and unusual treatment or punishment has been established, but they may take the underlying facts into account in determining whether the applicant will face hardship if returned to their country of origin.[39] In referring to the factors that must be assessed in an H&C application,[40] the author believes that the assessment rests on considerations other than those of relevance to the Covenant. The H&C application is therefore not a substitute for the assessment of refugee status, which the author has been denied.

7.5 The author concludes that, due to his sexual orientation and his conversion, his life and freedom would be at risk in Egypt and that he would also face a risk of torture or cruel, inhuman or degrading punishment. He would be unable to pursue his romantic or sexual

[36] The author provides additional letters from pastors and other members of various churches, which attest to his attendance at church and his artistic talent.

[37] *Thuraisamy v. Canada*, para. 6.4.

[38] The author is referring to the case of *Kanthasamy v. Canada*, 2015 SCC 61.

[39] See the section "Humanitarian and compassionate assessment: Hardship and the H&C assessment," available on the website of the Government of Canada: www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-hardship-assessment.html.

[40] The author cites the relevant factors listed on the website of the Government of Canada (www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-hardship-assessment.html): establishment in Canada for in-Canada applications; ties to Canada; the best interests of any children directly affected by the H&C decision; factors in their country of origin including adverse country conditions; health considerations including inability of a country to provide medical treatment; family violence considerations; consequences of the separation of relatives; inability to leave Canada has led to establishment (in the case of applicants in Canada); ability to establish in Canada for overseas applications; any unique or exceptional circumstances that might merit relief.

life or practise his religion, and his rights under articles 6 (1), 7, 9 (1), 17, 18 and 19[41] of the Covenant would therefore be infringed. He thus asks the Committee to recognize these violations in his case.

Additional observations by the State party on admissibility and merits

8. On 23 March 2018, the State party submitted additional observations on the admissibility and merits of the communication in response to the author's comments, which had been transmitted to it for information on 17 July 2017. It recalls that the H&C application is a fair and equitable administrative procedure, subject to judicial review, which, in the event of a favourable decision, would allow the author to remain in Canada, and that the communication should therefore be declared inadmissible for failure to exhaust domestic remedies.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

9.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[42] The Committee notes that the author has not submitted a humanitarian and compassionate application and that the State party considers this to be an effective remedy. While noting the State party's observations that the humanitarian and compassionate application could allow the author to reside permanently in Canada, the Committee observes that the author's removal has not been stayed pending the consideration of a humanitarian and compassionate application and therefore considers that this application cannot be regarded as offering him an effective remedy under the circumstances.[43] Accordingly, it considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

9.4 With regard to the author's claims under articles 9 (1), 17, 18 and 27 of the Covenant, the Committee notes the State party's argument that its non-refoulement obligations do not extend to potential breaches of these provisions, and that these claims are therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol. The Committee further notes the State party's observation that the author has not clearly articulated how his removal to Egypt would violate the State party's obligations under these articles and notes that the author does not provide arguments in support of these allegations. The Committee concludes that the author has failed to sufficiently substantiate his allegations under articles 9 (1), 17, 18 and 27 of the Covenant for the purposes of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.[44]

9.5 The Committee further notes the State party's argument that the author's claims are inadmissible under article 2 of the Optional Protocol due to insufficient substantiation. With regard to the author's allegations under articles 6 (1) and 7 of the Covenant, the Committee

[41] Here, the author invokes article 19 of the Covenant, while in his initial communication and in his comments of 8 January 2016, he cites article 27.

[42] See *Warsame v. Canada*, para. 7.4, and *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5.

[43] See *Choudhary v. Canada*, para. 8.3, and *Warsame v. Canada*, para. 7.4.

[44] The Committee also notes that, in his additional observations, the author invoked article 19 rather than article 27; however, it considers that this was an error on the part of the author and it does not intend to address it.

observes that the author has explained that he feared returning to Egypt owing to his sexual orientation and his conversion from Islam to Christianity. The Committee considers that, for the purposes of admissibility, the author has sufficiently substantiated his allegations.[45] The Committee therefore declares the communication admissible insofar as it raises issues under articles 6 (1) and 7 and proceeds to consideration of the merits.

Consideration of the merits

10.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

10.2 The Committee notes the author's claim that his expulsion to Egypt would constitute an attack on his liberty, security and life on account of his sexual orientation and his conversion from Islam to Christianity. He further claims that the State party has not reasonably assessed the risk inherent in his removal.

10.3 The Committee recalls paragraph 12 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant. The Committee has also indicated that the risk must be personal[46] and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.[47] The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.[48]

10.4 The Committee notes the author's statements regarding his sexual orientation, his conversion from Islam to Christianity and the alleged risk of persecution that he may face from his family and the authorities should he be returned to Egypt. The Committee also takes note of the documents cited by the author in support of his allegations, which highlight the serious human rights abuses committed against homosexuals and converts to Christianity in Egypt. The Committee observes, however, that the author has not provided any specific argument that would lead to the conclusion that he would be at real and personal risk if he were to return and that the applications filed and arguments submitted by the author were thoroughly examined by the State party's authorities in the context of the consideration and subsequent reconsideration of his application for a pre-removal risk assessment. All the authorities identified contradictory and implausible elements in the author's statements. In particular, the Committee notes the State party's argument that the author has failed to substantiate or convincingly explain why he is unable to provide proof of the full identity of his alleged partner or of his partner's death in Egypt. It also notes the arguments of the State party that the medical letter submitted by the author documenting the injuries and scars he sustained does not explain the doctor's reasons for stating that they resulted from the attack in 2012 (see para. 6.14). The Committee notes that the author has not convincingly demonstrated his family ties with the persons he claims are his sister and his brother-in-law, nor that they have denounced him to the State authorities, as he claims. Following the analysis of the case file, the Canadian authorities came to the conclusion that the author's statements lacked credibility and that there was nothing more than a "mere possibility" that he would be persecuted if returned to Egypt.

10.5 The Committee notes that, although the author contests the assessment and findings of the Canadian authorities as to the risk of harm he faces in Egypt, he has not presented any evidence to sufficiently substantiate his allegations under articles 6 and 7 of the

[45] See *Biao Lin v. Australia* (CCPR/C/107/D/1957/2010), para. 8.6.

[46] See *K. v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.3; *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.2; and *X. v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2.

[47] See *X. v. Denmark*, para. 9.2; and *X. v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

[48] See, for example, *K. v. Denmark*, para. 7.4.

Covenant. The Committee considers that the information at its disposal demonstrates that the State party took into account all the elements available when evaluating the risk faced by the author — including the reports of the persecution of Christians, converts to Christianity and homosexuals in Egypt — and that the author has not identified any irregularity in the decision-making process. The Committee also considers that, while the author disagrees with the factual conclusions of the State party's authorities, he has not shown that they were arbitrary or manifestly erroneous, or that they amounted to a denial of justice. Consequently, the Committee considers that the evidence and circumstances mentioned by the author do not demonstrate that he would be at real and personal risk of being subjected to treatment contrary to articles 6 or 7 of the Covenant. In view thereof, the Committee is not able to conclude that the information before it shows that the author's rights under articles 6 (1) and 7 of the Covenant would be violated if he were removed to Egypt.

11. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not permit it to conclude that the author's expulsion to Egypt would, if implemented, violate his rights under articles 6 (1) and 7 of the Covenant.